RECORD AND BRIEFS

Supreme Court, U.S.
FILED
OCT 30 2017

No. 16-111

# In the Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD., AND JACK C. PHILLIPS,
*Petitioners,*

v.

COLORADO CIVIL RIGHTS COMMISSION, CHARLIE CRAIG, AND DAVID MULLINS,
*Respondents.*

*On Writ of Certiorari to the Court of Appeals of Colorado*

## BRIEF OF AMICI CURIAE PUBLIC ACCOMMODATION LAW SCHOLARS IN SUPPORT OF RESPONDENTS

Elizabeth Sepper
WASHINGTON UNIVERSITY SCHOOL OF LAW
Box 1120
One Brookings Drive
St. Louis, MO 63130
314-935-3380
liz.sepper@gmail.com

Catherine Weiss
*Counsel of Record*
Natalie J. Kraner
Rey Lambert
Meg Slachetka
LOWENSTEIN SANDLER LLP
One Lowenstein Drive
Roseland, NJ 07068
973-597-2438
cweiss@lowenstein.com

*Counsel for Amici Curiae*

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

Library of Congress

## TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... iii

INTEREST OF AMICI CURIAE ..... 1

SUMMARY OF ARGUMENT ..... 1

ARGUMENT ..... 3

I. The Exemption Sought by Masterpiece Would Subvert the Longstanding Duty of Businesses Open to the Public to Refrain from Discrimination ..... 3

A. State Statutes Have Barred Discrimination by All Businesses Open to the Public Since the Civil Rights Era .... 4

B. Equal Access to Public-Facing Businesses Has Deep Roots in the Common Law .... 7

C. After the Civil War, Laws Motivated by Racial Animus Conferred on Businesses the Right, and Eventually Imposed the Duty, to Exclude ..... 12

D. The Exemption Masterpiece Claims Would Undermine the Historic Effort to Secure Equal Access ..... 14

II. The First Amendment Does Not Give Masterpiece License to Discriminate ..... 15

A. Masterpiece Is a Classic Public Accommodation, Not a Noncommercial Entity Dedicated to Expression ..... 16

B. Masterpiece Is Not an Intimate Association ..... 20

C. Masterpiece Does Not Engage in Protected Personal Contractual Relationships ..... 21

D. The Free Exercise Clause Does Not Shield Masterpiece ..... 25

III. Public Accommodation Laws Further a Compelling Governmental Interest in Eradicating Discrimination That Outweighs Any Incidental Infringement on the Interests of Commercial Entities Like Masterpiece .. 26

A. The Key Purpose of the Public Accommodation Laws Is to Protect Equality and Dignity ..... 27

B. The Existence of Market Alternatives Does Not Justify an Exemption ..... 31

CONCLUSION ..... 36

## TABLE OF AUTHORITIES

### CASES

*Allnutt v. Inglis*,
104 Eng. Rep. 206 (K.B. 1810) ..... 10, 11

*Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*,
481 U.S. 537 (1987) ..... 28, 32

*Bell v. Maryland*,
378 U.S. 226 (1964) ..... 8, 17, 20

*Berrea College v. Kentucky*,
211 U.S. 45 (1908) ..... 13

*Bowlin v. Lyon*,
25 N.W. 766 (Iowa 1885) ..... 13

*Boy Scouts of Am. v. Dale*,
530 U.S. 640 (2000) ..... 15, 18

*Bragdon v. Abbott*,
524 U.S. 624 (1998) ..... 24

*Burwell v. Hobby Lobby Stores*,
134 S. Ct. 2751 (2014) ..... 26

*Civil Rights Cases*,
109 U.S. 3 (1883) ..... 6, 13

*Crosswaith v. Bergin*,
35 P.2d 848 (Colo. 1934) ..... 34

*Curran v. Mount Diablo Council of the Boy Scouts*,
952 P.2d 218 (Cal. 1998) ..... 23

*Darius v. Apostolos*,
190 P. 510 (Colo. 1920) ..... 6

*Dobbins v. 8-Ball Tattoo*,
No. 7384, 1996 WL 752938 (Ohio Civ. Rts. Comm'n Oct. 17, 1996) . . . . . 24

*Donnell v. State*,
48 Miss. 661 (1873) . . . . . 12

*Elane Photography, LLC v. Willock*,
309 P.3d 53 (N.M. 2013) . . . . . 6, 22, 24

*Evans v. Ross*,
154 A.2d 441 (N.J. Super., App. Div. 1959) . . 5, 35

*Heart of Atlanta Motel v. United States*,
379 U.S. 241 (1964) . . . . . 2, 4, 28, 32, 35

*Hishon v. King & Spalding*,
467 U.S. 69 (1984) . . . . . 19

*Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) . . . . . 25

*Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,
515 U.S. 557 (1995) . . . . . 18

*Jones v. Alfred H. Mayer Co.*,
392 U.S. 409 (1968) . . . . . 14

*Kansas Comm'n on Civil Rights v. Sears, Roebuck & Co.*, 532 P.2d 1263 (Kan. 1975) . . . . 5

*King v. Greyhound Lines*,
656 P.2d 349 (Or. Ct. App. 1982) . . . . . 28

*Lambert v. Mandel's of Cal.*,
319 P.2d 469 (Cal. App. 1957) . . . . . 5

*Lochner v. New York*,
198 U.S. 45 (1905) ..... 13

*Lombard v. Louisiana*,
373 U.S. 267 (1963) ..... 14

*Markham v. Brown*,
8 N.H. 523 (1837) ..... 8

*Messenger v. Pa. R.R. Co.*,
37 N.J.L. 531 (1874) ..... 10

*Messenger v. State*,
41 N.W. 638 (Neb. 1889) ..... 9

*Munn v. Illinois*,
94 U.S. 113 (1876) ..... 10, 11

*N.Y. State Club Ass'n v. City of New York*,
487 U.S. 1 (1988) ..... 15, 16–17

*NAACP v. Button*,
371 U.S. 415 (1963) ..... 19

*Nebbia v. New York*,
291 U.S. 502 (1934) ..... 30

*Newman v. Piggie Park Enters.*,
390 U.S. 400 (1968) ..... 26

*Obergefell v. Hodges*,
135 S. Ct. 2584 (2015) ..... 27, 30, 31

*People v. King*,
18 N.E. 245 (N.Y. 1888) ..... 9

*Perkins v. New Orleans Athletic Club*,
429 F. Supp. 661 (E.D. La. 1976) ..... 20

*Plessy v. Ferguson*,
163 U.S. 537 (1896), *overruled by*
*Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) . . . 13

*Prince v. Massachusetts*,
321 U.S. 158 (1944) . . . . . 25

*PruneYard Shopping Ctr. v. Robins*,
447 U.S. 74 (1980) . . . . . 17

*Rhone v. Loomis*,
77 N.W. 31 (Minn. 1898) . . . . . 13, 34

*Roberts v. U.S. Jaycees*,
468 U.S. 609 (1984) . . . . . *passim*

*Romer v. Evans*,
517 U.S. 620 (1996) . . . . . 3, 4, 7, 31

*Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*,
547 U.S. 47 (2006) . . . . . 19

*Runyon v. McCrary*,
427 U.S. 160 (1976) . . . . . *passim*

*Sauvinet v. Walker*,
27 La. Ann. 14, *aff'd*, 92 U.S. 90 (1875) . . . . . 9

*State v. Arlene's Flowers*,
No. 13-2-00871-5, 2015 WL 720213
(Wash. Super. Feb. 18, 2015) . . . . . 6

*Sullivan v. Little Hunting Park, Inc.*,
396 U.S. 229 (1969) . . . . . 21, 23

*Tillman v. Wheaton-Haven Recreation Ass'n*,
410 U.S. 431 (1973) . . . . . 21, 23

*Tony & Susan Alamo Found. v. Sec'y of Labor*,
471 U.S. 290 (1985) ..... 25

*Town of East Hartford v. Hartford Bridge Co.*,
17 Conn. 79 (1845) ..... 10

*United States v. Lee*,
455 U.S. 252 (1982) ..... 25

*Uston v. Resorts Int'l Hotel, Inc.*,
445 A.2d 370 (N.J. 1982) ..... 14

*W. Turf Ass'n v. Greenberg*,
204 U.S. 359 (1907) ..... 11

*Waugh v. Chauncey*,
13 Cal. 11 (1859) ..... 10

**CONSTITUTIONS, STATUTES, AND LEGISLATIVE HEARINGS**

U.S. Const. amend. I ..... *passim*

42 U.S.C. § 12181 (2012) ..... 34

42 U.S.C. § 12182 (2012) ..... 24

42 U.S.C. § 2000a (2012) ..... 34

Civil Rights Act, ch. 114, 18 Stat. 335 (1875) .... 12

Colo. Const., art. II, § 30b ..... 7

Colo. Rev. Stat. § 24-34-601 (2014) ..... 7, 24

Fla. Stat. § 760.02 (2016) ..... 5

Or. Rev. Stat. § 659A.003 (2007) ..... 27

S.C. Code Ann. § 45-9-10 (2015) ..... 4

Va. Code Ann. § 2.2-3900 (2001) . . . . . 5

Act of Apr. 4, 1885, ch. 27, 1885 Colo. Sess. Laws 132 . . . . . 6

Act of Apr. 9, 1895, ch. 61, 1895 Colo. Sess. Laws 139 . . . . . 6

Act of June 7, 1969, ch. 74, 1969 Colo. Sess. Laws 200 . . . . . 6–7

Act of May 29, 2008, ch. 341, 2008 Colo. Sess. Laws 1593 . . . . . 7

Act of Mar. 9, 1961, ch. 256, 1961 Ind. Acts 585 . . . 5

Act of Mar. 6, 1899, ch. 41, 1899 Minn. Laws 38 . . 13

Act of Mar. 23, 1875, ch. 130, 1875 Tenn. Pub. Acts 216 . . . . . 12–13

*Religious Liberty Protection Act of 1998: Hearings on H.R. 4019 Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 105th Cong., 2nd Sess., 238 (1998) . . . . . 25

**OTHER AUTHORITIES**

Charles Abrams, *". . . Only the Very Best Christian Clientele,"* Commentary, Jan. 1, 1955 . . 29–30, 33

Alfred Avins, *The Civil Rights Act of 1875: Some Reflected Light on the Fourteenth Amendment and Public Accommodations*, 66 Colum. L. Rev. 873 (1966) . . . . . 9, 10

Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 Stan. L. Rev. 1205 (2014) . . . . . 18

3 William Blackstone, *Commentaries* (William Draper Lewis ed., 1902) ..... 8

Br. Org. Am. Historians as Amicus Curiae Supp. Pet'rs, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), 2015 WL 1004709 ..... 27

Wallace F. Caldwell, *State Public Accommodations Laws, Fundamental Liberties and Enforcement Programs*, 40 Wash. L. Rev. 841 (1965) ..... 5

Jack Greenberg, *Race Relations and American Law* (1959) ..... 33

Matthew Hale, *An Analysis of the Civil Part of the Law* (6th ed. 1820) ..... 10, 11

Oliver Wendell Holmes, Jr., *Common Carriers and the Common Law*, 13 Am. L. Rev. 609 (1879) .. 8

Douglas Laycock, Afterword, *in Same-Sex Marriage and Religious Liberty* (Douglas Laycock et al. eds., 2008) ..... 35

David Montejano, *Anglos and Mexicans in the Making of Texas, 1836–1986* (1987) ..... 32

Nat'l Conf. of State Legis., *State Public Accommodation Laws* (July 13, 2016), http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx .. 4

Nat'l Park Serv., *Civil Rights in America: Racial Desegregation of Public Accommodations* (2009) ..... 32, 33

Phil Nichols, *Redefining "Common Carrier": The FCC's Attempt at Deregulation by Redefinition*, 1987 Duke L.J. 501 (1987) ..... 11

James M. Oleske, Jr., *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, 50 Harv. C.R.-C.L. L. Rev. 99 (2015) . . . . . 30

Harry T. Quick, *Public Accommodations: A Justification of Title II of the Civil Rights Act of 1964*, 16 Case W. Res. L. Rev. 660 (1965) . . . . . 33

Elizabeth Sepper, *The Role of Religion in State Public Accommodations Laws*, 60 St. Louis Univ. L. J. 631 (2016) . . . . . 5–6, 34

Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. Rev. 1283 (1996) . . . . . 8, 9, 12, 13

Joseph Story, *Commentaries on the Law of Bailments* (2d ed. 1840) . . . . . 8

Tr. of Oral Arg., *Heart of Atlanta Motel v. United States*, 379 U.S. 69 (1964), *in 60 Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* (Philip B. Kurland & Gerhard Casper eds., 1975) . . . . . 32

## INTEREST OF AMICI CURIAE

Amici are legal scholars with expertise in the historical and contemporary applications of the public accommodation laws. This brief argues that the First Amendment exemption Masterpiece claims would subvert the historic purpose of these laws: to promote equal dignity in the marketplace. Amici include Elizabeth Sepper, Professor of Law, Washington University School of Law; Samuel Bagenstos, Frank G. Millard Professor of Law, Michigan Law School; Nan D. Hunter, Professor of Law, Georgetown University Law Center; James Oleske, Associate Professor of Law, Lewis & Clark Law School; and Joseph William Singer, Bussey Professor of Law, Harvard Law School. Amici file this brief in their individual capacities.[1]

## SUMMARY OF ARGUMENT

For more than half a century, state public accommodation laws across the country have protected against denials of dignity and equal treatment in the public marketplace. Throughout that period, this Court has consistently rejected arguments that businesses open to the general public have a constitutional right to provide less than the full and equal services required by such laws.

While the Court has zealously safeguarded the autonomy of expressive associations and religious

---

[1] No counsel for a party authored any part of this brief or made any monetary contribution to it. Petitioners and the Colorado Civil Rights Commission have filed general consents to amicus filings. The written consent of Respondents Craig and Mullins is appended to this brief.

institutions, it has sharply distinguished between the realm in which those entities operate and the realm of "commercial relationship[s] offered generally or widely." *Runyon v. McCrary*, 427 U.S. 160, 189 (1976) (Powell, J., concurring). As a result, commercial entities' First Amendment claims against public accommodation laws have failed, regardless of whether they were advanced as rights of free speech, association, or free exercise.

Masterpiece Cakeshop portrays its owner, Jack Phillips, as fighting to vindicate his personal rights to free expression and religious freedom. But Mr. Phillips does not come before this Court as an individual seeking to express himself through his art or his worship. He comes before this Court instead as the proprietor of a storefront bakery selling to the general public. It is in this role that he is subject to the antidiscrimination laws, and it is well within a state's power to rid the public marketplace of discrimination against those invited in to purchase goods and services, whether or not these goods are creatively designed.

Lawmakers across the nation and this Court have recognized that compelling governmental interests in preventing "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments" outweigh any incidental burdens on public-facing businesses. *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 250 (1964) (internal quotation marks omitted). To ensure equal dignity in the marketplace, state public accommodation laws typically cover all retail establishments and have never depended on the existence of monopolies. Whether or not a same-sex couple can order a wedding cake from

another local shop, the Colorado Antidiscrimination Act prevents a bakery from refusing to make a cake for a couple because they are gay.

Granting Masterpiece an exemption from Colorado's requirement of equal service would deprive same-sex couples of "protections taken for granted by most people either because they already have them or do not need them." *Romer v. Evans*, 517 U.S. 620, 631 (1996). Nothing in this Court's jurisprudence supports the conclusion that such a deprivation of equal dignity is constitutionally required.

## ARGUMENT

### I. The Exemption Sought by Masterpiece Would Subvert the Longstanding Duty of Businesses Open to the Public to Refrain from Discrimination.

State public accommodation laws across the country have barred discrimination by businesses serving the general public for at least half a century. Even as states have gradually extended protection to new classes of people, the central idea behind the laws has remained the same: businesses that choose to open their doors to the public have an obligation to provide equal services. In this way, public accommodation statutes restore the common law duty to serve that prevailed before the Civil War and applied to businesses holding out their services to the public. The result of a long civil rights movement, these laws reject the restriction of the duty to serve represented most starkly by Jim Crow. The exemption that Masterpiece seeks would undermine these longstanding efforts to

ensure that members of disadvantaged groups are treated equally in businesses serving the public.

### A. State Statutes Have Barred Discrimination by All Businesses Open to the Public Since the Civil Rights Era.

Nearly all states have public accommodation statutes. Nat'l Conf. of State Legis. [NCSL], *State Public Accommodation Laws* (July 13, 2016), http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx.[2] These laws ban discrimination on the basis of race, color, national origin, and religion, *id.*; all but one prohibit sex discrimination.[3] Seventeen reach marital status. *NCSL, State Public Accommodation Laws.* Eighteen forbid discrimination based on gender identity, and twenty-one ban sexual orientation discrimination. *Id.* Hundreds of cities and counties likewise bar discrimination linked to sexual orientation. *See Romer*, 517 U.S. at 623–24 (noting that three Colorado cities prohibited sexual orientation discrimination by 1991).

While the list of protected classes has broadened over time, the places where discrimination is prohibited have remained much the same for fifty years or longer in jurisdictions throughout the country. By 1964—still early in the Civil Rights Era—more than thirty states, and many cities, had public accommodation laws. *Heart of Atlanta*, 379 U.S. at 259–60. The majority of

---

[2] The exceptions are Alabama, Georgia, Mississippi, North Carolina, and Texas. *Id.*

[3] South Carolina is the sole exception. S.C. Code Ann. § 45-9-10(A) (2015).

these state laws already broadly covered businesses open to the general public, including retail stores. *See* Wallace F. Caldwell, *State Public Accommodations Laws, Fundamental Liberties and Enforcement Programs*, 40 Wash. L. Rev. 841, 844–46 (1965); *e.g.*, Act of Mar. 9, 1961, ch. 256, sec. 108, § 1, 1961 Ind. Acts 585 ("A place of public accommodation, resort or amusement . . . means any establishment, which caters or offers its services or facilities or goods to the general public . . . ."). As one court summarized, "[o]nce a proprietor extends his invitation to the public he must treat all members of the public alike." *Evans v. Ross*, 154 A.2d 441, 445 (N.J. Super., App. Div. 1959); *see also Lambert v. Mandel's of Cal.*, 319 P.2d 469, 470 (Cal. App. 1957) ("A retail shoe store is a place of *public* accommodation that is essentially like a place where ice cream and soft drinks are sold; each is open to the public generally for the purchase of goods."); *Kansas Comm'n on Civil Rights v. Sears, Roebuck & Co.*, 532 P.2d 1263, 1272 (Kan. 1975) ("We harbor little doubt that places of public accommodations were intended to include places where general retail trade is conducted . . . ."). Consistent with this history, commercial retailers bear nondiscrimination duties under nearly all current state laws.[4]

With few exceptions, not relevant to this case, the laws make no distinctions among the protected classes. Elizabeth Sepper, *The Role of Religion in State Public Accommodations Laws*, 60 St. Louis Univ. L. J. 631,

---

[4] Only Florida's statute does not reach retail stores. Fla. Stat. § 760.02(11) (2016). The reach of Virginia's statute is unclear, as it does not define public accommodations. Va. Code Ann. § 2.2-3900 (2001).

654–56 (2016). Thus, an exemption like the one claimed here would allow discrimination on the basis of religion, national origin, disability, sex, and race, as well as sexual orientation. *Elane Photography, LLC v. Willock*, 309 P.3d 53, 72 (N.M. 2013) (claimed exemption "would allow any business in a creative or expressive field to refuse service on any protected basis"); *see also State v. Arlene's Flowers*, No. 13-2-00871-5, 2015 WL 720213, at *27 (Wash. Super. Feb. 18, 2015) ("[T]here is no slope, much less a slippery one, where 'race' and 'sexual orientation' are in the same sentence of the statute, separated by only three terms: 'creed, color, national origin . . . .'").

Like many states, Colorado codified the duty of businesses open to the public after this Court invalidated the federal public accommodation statute in the *Civil Rights Cases*, 109 U.S. 3 (1883). Colorado guaranteed the "full and equal enjoyment" of a defined list of public accommodations. Act of Apr. 4, 1885, ch. 27, § 423, 1885 Colo. Sess. Laws 132. An 1895 amendment extended coverage beyond enumerated places to "all other places of public accommodation and amusement." Act of Apr. 9, 1895, ch. 61, § 1, 1895 Colo. Sess. Laws 139; *see also Darius v. Apostolos*, 190 P. 510 (Colo. 1920) (broadly interpreting the 1895 Act to apply to a bootblacking stand and rejecting ejusdem generis doctrine because "the kinds of business enumerated bear no common analogy to each other except that they are all for pecuniary profit").

The modern version of Colorado's statute, enacted in 1969, initially prohibited discrimination based on "race, creed, color, sex, national origin, or ancestry." Act of June 7, 1969, ch. 74, sec. 1, § 25-1-1, 1969 Colo.

Sess. Laws 200. Like other states, Colorado incrementally expanded the prohibited bases of discrimination: it has covered marital status and disability for almost forty years and sexual orientation and gender identity for a decade. Act of May 29, 2008, ch. 341, sec. 2, § 24-34-301(7), sec. 6, § 24-34-601(2), 2008 Colo. Sess. Laws 1593, 1596. Throughout the modern era, the definition of what constitutes a public accommodation has remained static: "any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public." Colo. Rev. Stat. § 24-34-601(1) (2014).

The 2008 inclusion of sexual orientation marked a significant milestone. Sixteen years earlier, a voter referendum had led to the adoption of Amendment 2 to the Colorado Constitution, denying to those of "Homosexual, Lesbian, or Bisexual orientation" the protection of state and local antidiscrimination laws. *Romer*, 517 U.S. at 624 (quoting Colo. Const., art. II, § 30b). This Court struck down Amendment 2, finding it "inexplicable by anything but animus toward the class it affects." *Id.* at 632. By adding "sexual orientation" to the public accommodation statute, the legislature in effect signaled its agreement with the reasoning in *Romer*.

### B. Equal Access to Public-Facing Businesses Has Deep Roots in the Common Law.

The common law history supports a right of equal access to businesses serving the public. Before the Civil War, the common law rule dictated that "[t]hose who hold themselves out as ready to serve the public

thereby make themselves public servants and have a duty to serve." Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. Rev. 1283, 1321 (1996) (reviewing English and American treatises, case law, and custom). William Blackstone described one classic application of the rule this way: "[I]f an inn-keeper, or other victualler, hangs out a sign and opens his house for travelers, it is an implied engagement to entertain all persons who travel that way . . . ." 3 William Blackstone, *Commentaries* *166 (William Draper Lewis ed., 1902). Similarly, Justice Joseph Story explained that a common carrier was one who "undertake[s] to carry goods for persons generally; and he must hold himself out as ready to engage in the transportation of goods for hire as a business, not as a casual occupation *pro hac vice*." Joseph Story, *Commentaries on the Law of Bailments* 321, § 495 (2d ed. 1840); *see also Bell v. Maryland*, 378 U.S. 226, 296–300 (1964) (Goldberg, J., concurring) (reviewing history of common law duty to serve); Oliver Wendell Holmes, Jr., *Common Carriers and the Common Law*, 13 Am. L. Rev. 609, 615 (1879) (discussing "the general obligation of those exercising a public or 'common' business to practise their art on demand").

A business that met this definition could not exclude any member of the public without good cause. In one exemplary case, the Supreme Court of New Hampshire held that an inn that allowed some stagecoach drivers access to public rooms to solicit fares from travelers could not bar one driver, "any more than [the innkeeper] has the right to admit one traveller and exclude another, merely because it is his pleasure." *Markham v. Brown*, 8 N.H. 523, 530 (1837).

Although innkeepers and common carriers were the focus of the early treatises and cases, the common law duty does not appear to have been limited to these businesses. Instead, the rule seems to have applied more broadly, to barbershops, victuallers, tailors, and traders, indeed, to "all businesses that hold themselves out as ready to serve the public." Singer, *supra*, at 1331. Early state public accommodation laws confirmed this understanding. *See Messenger v. State*, 41 N.W. 638, 639 (Neb. 1889) ("A barber, by opening a shop, and putting out his sign, thereby invites every orderly and well-behaved person who may desire his services to enter this shop during business hours. The statute will not permit him to say to one: 'You are a slave, or a son of a slave; therefore I will not shave you.'"); *People v. King*, 18 N.E. 245, 248–49 (N.Y. 1888) (upholding application of law to skating-rink and rejecting attempted distinction of the "business of an innkeeper or a common carrier"); *Sauvinet v. Walker*, 27 La. Ann. 14, *aff'd*, 92 U.S. 90 (1875) (applying law, which covered "all places of business," to a coffee house).

Contrary to arguments Professors Green and Upham make in their amicus brief, the original common law duty to serve was not predicated on a business's monopoly power. Br. Amici Curiae Profs. Green & Upham Supp. Pet'rs 33 & n.3 (Sept. 7, 2017). They claim support from what they describe as "the twenty antebellum 'representative cases about the monopoly characteristics of common carriers and their franchises and licenses.'" *Id.* (quoting Alfred Avins, *The Civil Rights Act of 1875: Some Reflected Light on the Fourteenth Amendment and Public Accommodations*, 66 Colum. L. Rev. 873, 888 n.80 (1966)). But none of these cases held that the

"monopoly characteristics" of the relevant businesses were what created a duty to serve the public. Instead, nearly every case addressed a different question: whether a franchise or license gave a business the power to prevent *competition*, as, for example, when a ferry owner tried to stop the construction of a nearby bridge (or vice versa). *E.g.*, *Waugh v. Chauncey*, 13 Cal. 11 (1859); *Town of East Hartford v. Hartford Bridge Co.*, 17 Conn. 79 (1845).

Only one of the cases cited by Professor Avins even discusses the duty to serve. *Messenger v. Pa. R.R. Co.*, 37 N.J.L. 531 (1874). *Messenger* refers to "monopoly," not in regard to the origin of this duty, but rather in holding that a carrier had violated this duty—explicitly anchored in the common law—by using "unequal charges" to "promote unfair advantages amongst the people and foster monopolies" for favored customers. *Id.* at 534–35.

Professors Green and Upham fare no better in attempting to convert Sir Matthew Hale's discussion of excessive wharf rates into a general "monopoly based explanation[] of the law of common carriers." Green Br. 29–30, 33; *see also* Br. Amici Curiae Law & Econ. Scholars 9–10 (Sept. 6, 2017) (same). Hale addressed "common carrier[s]" and other "common . . . tradesmen" elsewhere, and explained their duties based on "implied contract," not monopoly. *See* Matthew Hale, *An Analysis of the Civil Part of the Law* 76–77 (6th ed. 1820).

The English case *Allnutt v. Inglis*, 104 Eng. Rep. 206, 210–11 (K.B. 1810), and this Court's decision in *Munn v. Illinois*, 94 U.S. 113, 126–29 (1876)—cited by Professors Green, Upham, and the Law and Economics

Scholars—did follow Hale's teachings about controlling excessive fees charged by virtual monopolies. But those cases in no way undermine the longstanding duty to serve that extended to businesses that did not have monopoly power. *See Munn*, 94 U.S. at 131–32 ("[I]t is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, *or the baker*, or the cartman, or the hackney-coachman, pursues a public employment and exercises 'a sort of public office,' these plaintiffs in error do not.") (emphasis added); *Allnutt*, 104 Eng. Rep. at 209 (implicitly refuting monopoly justification for duties of common callings by noting that "there is a power in the public of increasing the number of public houses or of carriers indefinitely") (Ellenborough, C.J.); *see also* Phil Nichols, *Redefining "Common Carrier": The FCC's Attempt at Deregulation by Redefinition*, 1987 Duke L.J. 501, 513 (1987) (noting that a monopoly-based conception of a common carrier "contrasts markedly with the definition developed and used through two centuries of common law").

Indeed, thirty years after *Munn*, this Court dispatched a constitutional challenge to a public accommodation law without any reference to monopoly. The Court found it sufficient that

> [t]he race course in question, being held out as a place of public entertainment and amusement, is, by the act of the defendant, so far affected with a public interest that the state may, in the interest of good order and fair dealing, require defendant to perform its engagement to the public.

*W. Turf Ass'n v. Greenberg*, 204 U.S. 359, 364 (1907).

### C. After the Civil War, Laws Motivated by Racial Animus Conferred on Businesses the Right, and Eventually Imposed the Duty, to Exclude.

For a brief period during Reconstruction, it seemed that traditional rights of access would extend to those freed from slavery. Between 1865 and 1873, eight states of the former Confederacy and three northern states passed public accommodation laws, and courts generally upheld them. Singer, *supra*, at 1374–75. For example, the Mississippi Supreme Court reasoned that the common law had always demanded that inns, common carriers, and "public shows and amusements" be open to all "unless sufficient reason were shown." *Donnell v. State*, 48 Miss. 661, 681 (1873). The public accommodation law therefore "deal[t] with subjects which have always been under legal control" and "in no sense appropriate[d] the private property" of a theater owner who had been fined for excluding black patrons. *Id.* at 681–82. Following the states, Congress enacted a federal public accommodation law in 1875. Civil Rights Act, ch. 114, 18 Stat. 335 (1875).

After Southern Democrats overturned Reconstruction, the constriction of the duty to serve began in earnest. New state statutes first gave businesses a right to exclude customers at will. *See, e.g.*, Act of Mar. 23, 1875, ch. 130, § 1, 1875 Tenn. Pub. Acts 216–17 ("[H]ereafter no keeper of any hotel, or public house, or carrier of passengers for hire, or conductors, drivers, or employes [sic] of such carrier or keeper, shall be bound, or under any obligation to entertain, carry or admit, any person, whom he shall for any reason whatever, choose not to entertain, carry,

or admit . . . ."). In 1883, the Supreme Court struck down the federal public accommodation law. *Civil Rights Cases*, 109 U.S. 3. At the state level, judicial decisions around the country narrowed the kinds of businesses subject to a duty to serve. *E.g.*, *Bowlin v. Lyon*, 25 N.W. 766 (Iowa 1885) (exempting places of entertainment); *Rhone v. Loomis*, 77 N.W. 31, 31 (Minn. 1898) (same as to saloons, despite public accommodation law covering "places of . . . refreshment"), *superseded by statute*, Act of Mar. 6, 1899, ch. 41, § 1, 1899 Minn. Laws 38, 39 (adding saloons to statute).

In large swaths of the country, the newly minted right to exclude eventually became a duty to exclude. By 1900, every state in the former Confederacy, plus Kentucky, required segregation in places of public accommodation. Singer, *supra*, at 1388. The Court upheld these laws in *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

While the no-duty-to-serve statutes are often thought to reflect a contemporaneous trend toward expanding the property rights of businesses, *Lochner v. New York*, 198 U.S. 45 (1905), Jim Crow laws *required* segregation, thereby *constraining* the choices of businesses. Some businesses, including railroads, objected to the laws on the ground of excessive cost, Singer, *supra*, at 1378 & n.414, while some noncommercial entities resisted on moral grounds, *Berrea College v. Kentucky*, 211 U.S. 45 (1908). This inconsistency between the broadly conceived property rights of this period and the Jim Crow statutes indicates that the rejection of equal access stemmed

more from racial politics than from laissez-fare philosophy. *See Uston v. Resorts Int'l Hotel, Inc.*, 445 A.2d 370, 374 n.4 (N.J. 1982) (observing that the post-Reconstruction constriction of access "may have had less than dignified origins").

### D. The Exemption Masterpiece Claims Would Undermine the Historic Effort to Secure Equal Access.

Since roughly the middle of the twentieth century, state legislatures have reinstated by statute the antebellum understanding that businesses open to the general public have a duty to serve all patrons equally. For decades, every retail business in Colorado, and many other states, has been barred from discriminating. As Justice Douglas wrote in 1963, "[p]laces of public accommodation such as retail stores, restaurants, and the like render a 'service which has become of public interest' in the manner of the innkeepers and common carriers of old." *Lombard v. Louisiana*, 373 U.S. 267, 279 (1963) (concurring opinion) (internal citation omitted). Thanks to public accommodation laws, a dollar in the hand of an African-American, a Jew, a woman, or a Syrian buys the same goods and services in the public marketplace as a dollar in the hand of anyone else. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443 (1968) ("Negro citizens . . . would be left with 'a mere paper guarantee' if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man."). After a long struggle, Colorado and many other states decided that the same should be true for LGBT people. Creating a right for commercial businesses to discriminate based

on the owners' religious beliefs would immunize, yet again, denials of service to disfavored groups.

## II. The First Amendment Does Not Give Masterpiece License to Discriminate.

This Court has consistently recognized a distinction between private, selective, and primarily expressive activities where constitutional interests are at their peak, and the public sphere inhabited by outward-facing, nonselective associations and commercial businesses—like Masterpiece—where constitutional interests are at their weakest. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 657 (2000) (distinguishing entities like "taverns, restaurants, [and] retail shops" from organizations that "may not carry with them open invitations to the public" or are not "clearly commercial entities"); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring) (observing constitutional "dichotomy" between the rights of expressive and commercial organizations). Retail businesses, like Masterpiece, falling at the far public end of the spectrum, are subject to rational regulation of their commercial activities. *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 20 (1988) (O'Connor, J., concurring) ("Predominately commercial organizations are not entitled to claim a First Amendment associational or expressive right to be free from the anti-discrimination provisions triggered by the law.").

Masterpiece's use of "fine-art skills" to create custom wedding cakes, Pet'rs' Br. 5, does not change this result. The business transaction at issue—like many others that involve bespoke goods or custom services provided through an open invitation to the general public—is not afforded First Amendment

protection against the public accommodation laws. Masterpiece is not a nonprofit whose purpose is expression, a selective club, an individual entering into a personal contractual relationship, or any other entity that might warrant special First Amendment solicitude. Accordingly, the Constitution does not grant the bakery a license to discriminate.

### A. Masterpiece Is a Classic Public Accommodation, Not a Noncommercial Entity Dedicated to Expression.

As entities move from distinctly private and expressive to public and commercial, their constitutional protection from antidiscrimination laws diminishes. Where, as here, a commercial entity invites the public to transact business, First Amendment interests are at their weakest.

The Court has consistently validated state authority to apply nondiscrimination norms to commercial relationships that are not essentially private and personal in nature. In *Runyon v. McCrary*, the Court held that "commercially operated, nonsectarian schools" that "advertised and offered [educational services] to members of the general public" could not deny admission to prospective students on the basis of race. 427 U.S. at 168, 172. The Court explained that because the schools were open to the public and solicited applicants widely, they were subject to antidiscrimination law. *Id.* at 172 n.10. Similarly, in *Jaycees*, this Court held that the First Amendment did not bar a state from prohibiting sex discrimination by a nonprofit organization that offered "various commercial programs and benefits" to its basically unselective membership. 468 U.S. at 626; *see also N.Y.*

*State Club Ass'n*, 487 U.S. at 12 (same as to private dining clubs).

As a retail business, Masterpiece operates in "the marketplace of commerce." *Jaycees*, 468 U.S. at 636 (O'Connor, J., concurring). In this marketplace, "open to the public to come and go as they please," the state enjoys broad authority to create rights of public access on behalf of its citizens. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980); *see also Bell v. Maryland*, 378 U.S. 226, 313 (1964) (Goldberg, J., concurring) ("The broad acceptance of the public in this and in other restaurants clearly demonstrates that the proprietor's interest in private or unrestricted association is slight."). In its public-facing commercial transactions, Masterpiece retains "only minimal constitutional protection" and does not satisfy the requirements for the exemption it seeks. *Jaycees*, 468 U.S. at 634 (O'Connor, J., concurring).

Indeed, the schools and clubs held subject to antidiscrimination law in *Runyon* and *Jaycees* had stronger claims to First Amendment protection than does Masterpiece. Each plausibly argued that it existed to inculcate values, *Runyon*, 427 U.S. at 176 ("[I]t may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable . . . ."), or to foster personal associations based on shared views, *Jaycees*, 468 U.S. at 623 (compelling admission of women "may impair the ability of the original members to express only those views that brought them together"). Such concerns do not arise in the same way in regard to the transactions between a bakery and its customers.

The cases on which Masterpiece chiefly relies involve entities entirely unlike the bakery. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, the Court recognized a parade as a quintessential form of expression whose sponsors were entitled to control its message. 515 U.S. 557, 572–75 (1995). In *Boy Scouts of America v. Dale*, the Court protected the associational rights of a nonprofit organization whose mission "to instill values" depended on "expressive activity." 530 U.S. at 649–50. Masterpiece does not exist for the purpose of noncommercial communication.

The artistic or expressive elements involved in creating wedding cakes do not transform Masterpiece into the type of entity that warrants First Amendment protection from antidiscrimination law. Places long recognized as public accommodations—music venues, theaters, and dance halls—engage in and curate artistic endeavors. Hotels decorate banquet halls for celebrations, arranging linens, tableware, and flowers.

> If the fact that the service provided by a business incorporates an expressive element is sufficient to create a First Amendment defense against the application of a public accommodations law, then all of these businesses should have a First Amendment defense to a law that prohibits them from discriminating against customers on the basis of sexual orientation—or race, or any other group status, for that matter.

Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 Stan. L. Rev. 1205, 1235 (2014).

Like Masterpiece, "innumerable commercial associations also engage in some incidental protected speech or advocacy." *Jaycees*, 468 U.S. at 635 (O'Connor, J., concurring). But the Court has shielded only noncommercial entities from antidiscrimination laws, and only when application of those laws would undermine the organization's message. *Id.* (distinguishing entities engaged in noncommercial activity that is "predominantly of the type protected by the First Amendment" from quasi-commercial membership organization). Thus, while recognizing that law firms "make a 'distinctive contribution . . . to the ideas and beliefs of our society,'" the Court denied First Amendment protection to a commercial firm that sought to make partnership decisions without regard to a law barring sex discrimination in employment. *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (quoting *NAACP v. Button*, 371 U.S. 415, 431 (1963)); *see also Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 61–62 (2006) (holding law schools subject to equal-access mandate, even though law required them to send emails and post notices on behalf of military recruiters, because burden on speech was "plainly incidental" to regulation of conduct).

The custom nature of services also does not immunize a public-facing business from antidiscrimination law. Public accommodations commonly offer bespoke or handmade goods, or personalized services with creative elements. Restaurants and caterers plan and cook meals to their patrons' aesthetic and gustatory preferences. Tailors make and alter garments with an individualized look. Jewelers sell unique pieces for special occasions. It is not the type of good or service that defines whether an

entity can avail itself of an exemption from antidiscrimination law, but rather the relationship between that business and the public. *See Jaycees*, 468 U.S. at 624 (describing importance of "equal access to *publicly* available goods and services") (emphasis added).

### B. Masterpiece Is Not an Intimate Association.

Retail businesses stand in contrast to distinctly private places, which are "distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." *Jaycees*, 468 U.S. at 620.

The most intimate personal affiliations—"[f]amily relationships"—have "a substantial measure of sanctuary from unjustified interference by the State." *Id.* at 618, 619–20. Thus, the home is the quintessential protected sphere where people enjoy broad rights to discriminate in the interest of freedom of association, free exercise of religion, and privacy. *Bell*, 378 U.S. at 253 (Douglas, J., concurring); *id.* at 313 (Goldberg, J., concurring).

Moving closer to the center of the public-private spectrum are associations created to foster exclusive personal relationships based on common interests, social or political views, or school-affiliations, for example. *See, e.g.*, *Perkins v. New Orleans Athletic Club*, 429 F. Supp. 661, 665 (E.D. La. 1976) (holding a medium-sized athletic club, whose owners intended it to be private and did not advertise to the public, was not required to admit a black man to membership).

Organizations claiming exemptions as "private clubs" must have a "plan or purpose of exclusiveness"; exclusion of only members of a protected class does not demonstrate such a purpose. *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 438 (1973) (holding that swim club "open to every white person within the geographic area," with no selection criteria other than race, could not discriminate); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 236 (1969) (same).

Masterpiece is not an intimate association. The relationship for which it seeks First Amendment protection is between a commercial business and its customers, not between family members, friends, or members of an exclusive club. "The Constitution does not guarantee a right to choose . . . those with whom one engages in simple commercial transactions . . . ." *Jaycees*, 468 U.S. at 634 (O'Connor, J., concurring).

### C. Masterpiece Does Not Engage in Protected Personal Contractual Relationships.

In his concurrence in *Runyon*, Justice Powell identified another type of association that may invoke constitutional protection: "personal contractual relationships . . . where the offeror selects those with whom he desires to bargain on an individualized basis," as compared to a "commercial relationship offered generally or widely." 427 U.S. at 187, 189. Justice Powell was concerned about governmental intrusion into the "refusal to contract by a private citizen . . . where the contract is the foundation of a close association (such as, for example, that between an

employer and a private tutor, babysitter, or housekeeper)." *Id.* at 187.

Although this Court has never been asked to evaluate where such a "personal contractual relationship" would fall on the public-private spectrum, the factors to consider are evident from the case law: the nature of the contracting parties (a "private citizen" versus a commercial business), the duration of the relationship, the intimacy of contact between the parties, the manner in which the offer is made and to whom, and what "purpose of exclusiveness" exists that might trump the antidiscrimination laws governing the commercial aspects of the transaction.

For example, if a state were to apply its public accommodation law to restrict the contracting choices of a freelancer who "selects those with whom he desires to bargain on an individualized basis," *Runyon*, 427 U.S. at 187, there might be a viable First Amendment claim. *Id.* at 188–89 (Powell, J., concurring) (noting that "[a] small kindergarten or music class, operated on the basis of personal invitations extended to a limited number of preidentified students . . . would present a far different case" because such contracts "reflect the selectivity exercised by an individual entering into a personal relationship"). Indeed, it is unlikely that public accommodation laws would be interpreted to reach such contexts in the first place. *See Elane Photography*, 309 P.3d at 66 (noting that New Mexico's statute would not apply to a photographer who "was hired by certain clients but did not offer its services to the general public").

Masterpiece's dealings with couples ordering custom wedding cakes exhibit none of the indicia of the type of

"personal contractual relationship" that might warrant protection. First, the bakery is not "selective" in the sense this Court has used that word. Masterpiece's offer to make custom cakes goes out to the public: "Select from one of our galleries or order a custom design. Call or come in. We look forward to serving you!" Masterpiece Cakeshop, www.masterpiececakes.com (last visited Oct. 27, 2017). This general invitation is fatal to its First Amendment claim. Its "pattern of exclusion is . . . directly analogous to that at issue in [*Sullivan*] and [*Tillman*,] where the so-called private clubs were open to all objectively qualified whites." *Runyon*, 427 U.S. at 172 n.10 (citations omitted). Even more than these ostensibly private membership clubs, Masterpiece has made an explicit invitation to all to come in and order "a custom design" for a wedding cake. It cannot then refuse to serve same-sex couples.

Second, the bakery is not a "private citizen" seeking to establish a contract that is "personal." *Runyon*, 427 U.S. at 187 (Powell, J., concurring). The relationship between Masterpiece and its customers is not one of "close association," such as that between a parent and a babysitter. *Id.* Personal contracts arise from offers that are "selective" and require interviews or vetting because the association demands ongoing interaction. The bakery, by contrast, enters into discrete contracts of short duration for the sale of goods. *Curran v. Mount Diablo Council of the Boy Scouts*, 952 P.2d 218, 241 (Cal. 1998) (Mosk, J., concurring) (describing classic public accommodations as entities that provide "goods or services, 'nongratuitous[ly]' . . . in the course of 'relatively noncontinuous, nonpersonal, and nonsocial' dealings") (citation omitted). When it agrees to make a custom wedding cake, Masterpiece thus

engages in the sort of "commercial relationship offered generally or widely" that is "clearly" not entitled to constitutional protection. *Runyon*, 427 U.S. at 188–89 (Powell, J., concurring).

Third, Masterpiece's transactions do not involve physical intimacy through close contact. Myriad entities expressly covered by Colorado law—including "a barber shop, bathhouse, swimming pool, bath, steam or massage parlor, [or] gymnasium" and a "clinic, hospital, or convalescent home"—require significantly greater intimacy between staff and patrons. Col. Rev. Stat. Ann. § 24-34-601(1) (2014). Likewise, this Court has held that a dentist's office may not refuse to treat an HIV-positive patient except upon a showing of a "direct threat to the health or safety of others," *Bragdon v. Abbott*, 524 U.S. 624, 648 (1998) (quoting Americans with Disabilities Act, 42 U.S.C. § 12182(b)(3) (2012)), and a state commission has held that a tattoo parlor, which offers both physically intimate and artistic services, cannot refuse a tattoo to an HIV-positive man but must "offer its services to all persons." *Dobbins v. 8-Ball Tattoo*, No. 7384, 1996 WL 752938, at *5 (Ohio Civ. Rts. Comm'n Oct. 17, 1996).

Once Masterpiece offered custom-made wedding cakes to the public at large, rather than to a selective group on the basis of personal invitation, it lost its claim to decline full and equal service to its customers. *Elane Photography*, 309 P.3d at 67 ("If a commercial photography business wishes to offer its services to the public, thereby increasing its visibility to potential clients, it will be subject to the antidiscrimination provisions of the NMHRA.")

### D. The Free Exercise Clause Does Not Shield Masterpiece.

The same public-private distinction is also evident in this Court's decisions under the Free Exercise Clause, which eventually came to reflect Justice Jackson's view that "money-raising activities on a public scale are . . . Caesar's affairs and may be regulated by the state so long as it does not discriminate against one because he is doing them for a religious purpose." *Prince v. Massachusetts*, 321 U.S. 158, 177 (1944) (Jackson, J., dissenting); *see also United States v. Lee*, 455 U.S. 252, 261 (1982) ("When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.").

Testifying before Congress, Professor Douglas Laycock aptly described the state of the law: "courts have never disagreed that in the outside-world, religiously motivated people have to comply with the civil rights law." *Religious Liberty Protection Act of 1998: Hearings on H.R. 4019 Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 105th Cong., 2nd Sess., 238 (1998). While this Court has zealously safeguarded the internal operations of religious institutions, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012), it has sharply distinguished between church governance and "commercial activities" subject to regulation, *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 299 (1985) (rejecting claim of nonprofit religious organization to free exercise

exemption from the Fair Labor Standards Act in its businesses that "serve the general public in competition with ordinary commercial enterprises"). Indeed, in the one case to reach the Court involving a small business owner who sought a free exercise exemption from a public accommodation law, the Court dismissed the claim as "patently frivolous." *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402–03 n.5 (1968) (per curiam).[5] Masterpiece's invocation of the Free Exercise Clause does not advance its case.

## III. Public Accommodation Laws Further a Compelling Governmental Interest in Eradicating Discrimination That Outweighs Any Incidental Infringement on the Interests of Commercial Entities Like Masterpiece.

Even if Masterpiece had a First Amendment claim, the state interest in protecting equality and dignity in the commercial marketplace precludes an exemption. Nor can a same-sex couple's right to equal access be satisfied by a referral to a different, more willing merchant.

---

[5] While legislatures *can* regulate in the commercial realm without making religious exemptions, they will not always choose to do so. This Court recently applied a *statutory* exemption right that goes "far beyond what this Court has held is constitutionally required." *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751, 2767 (2014). Whatever the outer limits of such statutory exemptions, the Free Exercise Clause itself does not bar a state from enforcing the long-settled understanding of the commercial marketplace as an egalitarian public sphere.

### A. The Key Purpose of the Public Accommodation Laws Is to Protect Equality and Dignity.

LGBT people have suffered widespread discrimination throughout our nation's history. As this Court recognized in *Obergefell*, "[u]ntil the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations," and "many persons did not deem homosexuals to have dignity in their own distinct identity." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015). The experience of gays and lesbians in public accommodations was no exception. Their public gatherings were targeted by police, *id.*; businesses expelled couples for showing affection; and, fearful of police raids, bars posted signs announcing "We Do Not Serve Homosexuals." Br. Org. Am. Historians as Amicus Curiae Supp. Pet'rs 13, *Obergefell*, 135 S. Ct. 2584, 2015 WL 1004709, at *13.

To rectify such discrimination, Colorado and many other states added "sexual orientation" and "gender identity" as prohibited bases for discrimination under their public accommodation laws. In doing so, they recognized the "just claim to dignity" of LGBT people in public commerce. *Obergefell*, 135 S. Ct. at 2596; *see also, e.g.*, Or. Rev. Stat. § 659A.003 (2007) (explicitly invoking the importance of ensuring human dignity by prohibiting sexual orientation discrimination).

It has long been settled that public accommodation laws further a compelling governmental interest in eradicating discrimination that outweighs any incidental infringement on the interests of public-facing, commercial entities like Masterpiece. *See, e.g.*,

*Heart of Atlanta*, 379 U.S. at 260–61; *Jaycees*, 468 U.S. at 623–29; *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987). And, while such laws foster market access and eliminate search costs, their "fundamental object" is to prevent the "deprivation of personal dignity that surely accompanies denials of equal access to public establishments." *Heart of Atlanta*, 379 U.S. at 250. Indeed,

> the chief harm resulting from the practice of discrimination by establishments serving the general public is not the monetary loss of a commercial transaction or the inconvenience of limited access but, rather, the greater evil of unequal treatment, which is the injury to an individual's sense of self-worth and personal integrity.

*King v. Greyhound Lines*, 656 P.2d 349, 352 (Or. Ct. App. 1982).

Rejecting a First Amendment claim to discriminate against women in *Jaycees*, the Court held that states have a compelling interest in preventing the "unique evils" that result from "invidious discrimination in the distribution of publicly available goods, services, and other advantages." 468 U.S. at 628.

Like the ban on sex discrimination in Minnesota's statute, Colorado's prohibition of sexual orientation discrimination is "unrelated to the suppression of expression" and "plainly serves compelling state interests *of the highest order*." *Jaycees*, 468 U.S. at 624 (emphasis added). Indeed, even more clearly than the application of Minnesota's statute to the Jaycees, Colorado's prohibition—applied here to a commercial

business open to the public—"responds precisely to the substantive problem" of discrimination in the public market and "abridges no more speech or associational freedom than is necessary." *Id.* at 629 (internal quotation marks omitted).

Masterpiece argues that it is entitled to an exemption to relieve Mr. Phillips of the dignitary harm he has suffered by virtue of having his religious beliefs labeled as discriminatory. Pet'rs' Br. 55–56. No doubt those, like Mr. Philips, who sincerely believe that same-sex marriage is sacrilegious, *id.* 22, find themselves at odds with a growing number of Americans who reject that view. Colorado, however, does not require Mr. Phillips to change his personal views or religious beliefs or practices. Instead, the state seeks to ensure that a bakery, open to all passersby, does not refuse to bake a cake for a couple because they are gay. The application of antidiscrimination law may cause Mr. Phillips distress, but that does not suffice to exempt his bakery from duties binding on all retail businesses. *Cf. Jaycees*, 468 U.S. at 623 (requiring admission of women even though "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire.").

Throughout our history, antidiscrimination laws have given rise to objections of all kinds. Like Mr. Phillips, many objectors have insisted that their views are "neither invidious nor based on the slightest bit of animosity." Pet'rs' Br. 53; *see also* Charles Abrams, *". . . Only the Very Best Christian Clientele,"* Commentary, Jan. 1, 1955, at 13 (noting that 1940s

hotels frequently advertised "[a]lthough we hold no prejudices, for the good of all concerned we must adhere as closely as possible to a restricted clientele policy," serving Christians).

As this Court observed in *Obergefell*, practices like these may originate in "decent and honorable religious or philosophical premises." 135 S. Ct. at 2602. The dignitary interests of those who oppose certain marriages thus receive protection against government coercion of conduct in the private realm and government censorship of opinion in public discourse. But those interests do not provide constitutional immunity from generally applicable laws regulating commercial conduct and protecting the equal dignity of customers. *See generally Nebbia v. New York*, 291 U.S. 502, 538–39 (1934) ("The Constitution does not secure to any one liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people."); *see also* James M. Oleske, Jr., *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, 50 Harv. C.R.-C.L. L. Rev. 99, 145–46 (2015) (noting that "no state has ever exempted commercial business owners from the obligation to provide equal services for interracial marriages, interfaith marriages, or marriages involving divorced individuals—even though major religious traditions in America have opposed each type of marriage").

After expressing its respect for religious objectors in *Obergefell*, this Court said, "when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the

imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied." 135 S. Ct. at 2602. While laws banning same-sex marriage were an especially deep incursion on the freedom and equality of LGBT people, a First Amendment exemption allowing businesses to turn them away would also "demean and stigmatize" these groups—approving their exclusion from those "transactions and endeavors that constitute ordinary civic life in a free society." *Romer*, 517 U.S. at 631. "Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty." *Obergefell*, 135 S. Ct. at 2600.

### B. The Existence of Market Alternatives Does Not Justify an Exemption.

Because same-sex couples can buy wedding cakes from bakeries that do not discriminate against them, Masterpiece posits that its discrimination inflicts little harm on its victims. Pet'rs' Br. 60–61. That view subverts the central purpose of the public accommodation laws, which is to ensure equal treatment in the public marketplace.

Consider, by way of comparison, discrimination based on religion: suppose a bakery decided that it would not make cakes for Muslim weddings, based on the owner's sincere view that Islam is a religion of violence. The compelling interest in prohibiting such discrimination would not diminish simply because Muslims in some communities would have market alternatives. The same is true for same-sex couples. Full and equal dignity in the marketplace requires more than an assurance that someone else will do business with the targeted group.

In *Heart of Atlanta*, this Court heard—and apparently was unconvinced by—a similar argument that the Civil Rights Act should not apply to the motel, because so many hotels had already desegregated that "there was not any shortage of rooms." Tr. of Oral Arg. at 49–50, *in 60 Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* (Philip B. Kurland & Gerhard Casper eds., 1975). Similarly, *Rotary Club* and *Jaycees* did not turn on whether women had other opportunities for networking or club membership, despite evidence of such alternatives. *See Jaycees*, 468 U.S. at 613 (noting that Jaycees accepted women as members but limited their privileges); *Rotary Club*, 481 U.S. at 541 (noting that women could attend Rotary meetings, make speeches, and receive awards).

Public accommodation laws never rested on pervasive exclusion from the market. Throughout the twentieth century, disfavored minorities typically had access to a market niche, while being denied full and equal enjoyment of the entire market. Before the Civil Rights Era, Mexican, Asian, and Sikh farm laborers in California might frequent the one market willing to serve them, while otherwise encountering signs reading "White Trade Only." Nat'l Park Serv., *Civil Rights in America: Racial Desegregation of Public Accommodations* 92–93 (2009). In South Texas, Mexicans could shop in "their own dry goods stores, grocery stores, meat markets, tailor shops and a number of other shops." David Montejano, *Anglos and Mexicans in the Making of Texas, 1836–1986* 167 (1987) (internal quotation marks omitted). By the late 1950s, even in the Deep South, retail stores solicited the trade

of black customers. Jack Greenberg, *Race Relations and American Law* 113 (1959).

Likewise, when Congress passed Title II of the Civil Rights Act of 1964, discrimination differed across geographic areas and economic sectors. Under Masterpiece's view, Title II would not have applied to the many Northern and Western states or, at least, cities where market alternatives existed. Harry T. Quick, *Public Accommodations: A Justification of Title II of the Civil Rights Act of 1964*, 16 Case W. Res. L. Rev. 660, 708 (1965) ("Negroes have patronized theaters, restaurants, amusement parks, and public conveyances, in some locales [in Ohio], to such an extent that their presence is unnoted."); Greenberg, *supra*, at 109–10 (examination found virtually no discrimination in restaurants in D.C. and New York City in 1954). The Act would not have safeguarded all races, national origins, and religions, as groups had widely varying experiences of discrimination. *See, e.g.*, Nat'l Park Serv., *supra*, at 116 (throughout the twentieth century, "there was uneven consistency in how and when denials of services" confronted Asian American residents); Abrams, *supra*, at 15 (reporting that half of resorts in Maine, Vermont, and New Hampshire allowed Jews as guests). If Masterpiece's view were correct, Colorado's law would apply only in those locales where alternatives are unavailable to particular protected classes—a standard that would be unworkable for businesses, customers, and courts.

The issue is not—and never has been—whether the target of discrimination can ultimately obtain service. In 1934, for instance, the Colorado Supreme Court reversed a judgment against a black plaintiff who sued

a restaurant for violation of the State's public accommodation law. *Crosswaith v. Bergin*, 35 P.2d 848, 849 (Colo. 1934). The restaurant had seated his party and was willing to serve him food but only if he ate in the kitchen. The restaurant argued that, because he could have eaten, there was no discrimination and not even "five cents damages." *Id.* at 848. The court rejected that argument, stating "there was undoubtedly the kind of discrimination against which the law is obviously aimed." *Id.*

Masterpiece discounts the effect of an exemption on LGBT people, wrongly claiming that "nondiscrimination laws regularly include exceptions and significant coverage gaps." Pet'rs' Br. 59. No state public accommodation law exempts commercial businesses. Other exemptions are both rare and narrow. Sepper, *supra*, at 652–62. Colorado's exemption for places of worship merely restates constitutional limits.

The federal laws Masterpiece cites are more limited than their state counterparts. In particular, Title II—unlike many state laws of the 1960s—covers only enumerated establishments including hotels, restaurants, and places of entertainment. 42 U.S.C. § 2000a(b) (2012). But Title II was never intended to set a ceiling for combatting discrimination. Congress itself chose to define "public accommodations" more broadly, and more in line with parallel state laws, in the Americans with Disabilities Act. 42 U.S.C. § 12181(7) (2012). Moreover, ensuring equal access to places open to the public has typically been the province of the states. *See, e.g.*, *Rhone*, 77 N.W. at 32.

As history teaches, granting exemptions to the State of Colorado's equal access statute would have the effect of creating stigma. Same-sex couples "planning a wedding might be forced to pick their merchants carefully, like black families driving across the South half a century ago." Douglas Laycock, Afterword, *in Same-Sex Marriage and Religious Liberty* 189, 200 (Douglas Laycock et al. eds., 2008); *see Heart of Atlanta*, 379 U.S. at 253 (noting "the obvious impairment of the Negro traveler's pleasure and convenience that resulted when he continually was uncertain of finding lodging"). They would once again suffer "the embarrassment and humiliation of being invited to an establishment, only to find its doors barred to them." *Evans*, 154 A.2d at 445. The Constitution does not—and never has—required such a deprivation of equal dignity.

## CONCLUSION

For these reasons, Amici respectfully urge the Court to affirm.

Respectfully submitted,

Elizabeth Sepper
WASHINGTON UNIVERSITY
SCHOOL OF LAW
Box 1120
One Brookings Drive
St. Louis, MO 63130
314-935-3380
liz.sepper@gmail.com

Catherine Weiss
*Counsel of Record*
Natalie J. Kraner
Rey Lambert
Meg Slachetka
LOWENSTEIN SANDLER LLP
One Lowenstein Drive
Roseland, NJ 07068
973-597-2438
cweiss@lowenstein.com

*Counsel for Amici Curiae*
*Public Accommodation Law Scholars*

October 30, 2017